Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JAMES F. RIPLEY, D.D.S., M.H.A., PETITIONER

v.

WYOMING MEDICAL CENTER, INC., A WYOMING CORPORATION; JAMES ANDERSON, M.D.; JOHN D. BAILEY, M.D.; STEVE CHADDERDON; THOMAS CUNNINGHAM, M.D.; MARK DOWELL, M.D.; KEN EICKOFF; PAM FULKS; BILL MCDOWELL; MARK MCGINLEY, M.D.; SUSIE MCMURRY; STEVEN ORCUTT, M.D.; DIANE PAYNE; MIKE REID; CRAIG SMITH; LOUIS STEPLOCK, M.D.; WERNER STUDER, M.D.; JAY A. SWEDBERG, M.D., INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a property interest lose 14th Amendment Due Process protection simply because the outcome of a hearing to preserve it may be adverse to the holder of the interest?

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The opinion of the Tenth Circuit affirming the District Court's denial of Petitioner's Due Process claim is officially reported at 559 F.3d 1119 (10th Cir. 2009) and is reproduced at App. A., 1a-16a. The decision of the Tenth Circuit denying Petitioner's Petition for Rehearing and/or Rehearing En Banc is not officially reported but is reproduced at App. A., 44a. The District Court's opinion granting summary judgment on Petitioner's Due Process claim is not officially reported but is reproduced at App A., 17a-43a.

JURISDICTION

The Tenth Circuit Court of Appeals opinion in favor of the Respondent was entered on March 16, 2009. A Petition for Rehearing and/or Rehearing En Banc was timely filed, and the Panel denied said Petition on April 28, 2009. This Petition for Writ of Certiorari is timely filed under Supreme Court Rule 13(1) and this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

(see appendix)

STATEMENT

Petitioner is an oral and maxillofacial surgeon who has lived and practiced in Natrona County, Wyoming since 2003. His educational background includes graduation from the State School of New York at Buffalo with a D.D.S. degree and the subsequent completion of a four-year residency in oral and

maxillofacial surgery at the University of Texas Health Sciences Center in San Antonio, Texas. Before moving to Wyoming, Dr. Ripley practiced in Texas and Arizona. In each location, he was accorded full privileges as a member of the medical staffs of the hospitals with which he was affiliated. Respondents are a publically funded hospital located in Natrona County, Wyoming and past and present officers and members of the board of that hospital.

Since August 2004 Dr. Ripley has been denied membership to the Medical Staff at Wyoming Medical Center because of Respondents' interpretation of WMC's Bylaws to exclude all health care providers with a degree from a dental school from being allowed to become members of the Medical Staff under any circumstances. The fact that Dr. Ripley's degree is from a dental school is the sole reason that he has been denied membership to the Medical Staff at Wyoming Medical Center.

Wyo. Stat. Ann. §35-2-113 prohibits a decision on medical staffing of publically funded hospitals based upon the fact alone that a practitioner's degree is from a dental school. *W.S. §35-2-113* states in part that admission to the medical staffs of publicly funded hospitals shall be open to "doctors of medicine, doctors of osteopathy, doctors of chiropractic, doctors of dentistry, and podiatrists" and admission "shall not be predicated solely upon the type of degree of the applicant and the governing body shall consider the competency and character of each applicant." The Respondents have never sought to deny Dr. Ripley admission to the Medical Staff based upon his competency or character.

Dr. Ripley's Amended Complaint alleges that his right to be a member of Wyoming Medical Center's Medical Staff is a property right and that Respondents' actions in denying him membership to the Medical Staff solely on the basis of being degreed from a dental school denies him that property right without due process of law pursuant to the *5th and 14th Amendments to the United States Constitution*. The Amended Complaint asserts a claim under *42 U.S.C. §1983* for damages resulting from the denial of membership to the Medical Staff by the hospital and it officers and board members.

Following discovery, Dr. Ripley filed a Motion for Partial Summary Judgment with respect to the issue of liability on the due process claim. Prior to trial, the District Court entered an Order denying Dr. Ripley's Motion for Partial Summary Judgment and granting summary judgment to the Respondents despite the fact that Respondents had not moved for summary judgment. Judgment was entered dismissing Dr. Ripley's claims, and an appeal was timely taken to the United States Court of Appeals for the Tenth Circuit.

The Tenth Circuit accepted the appeal, and a three judge Panel of the Tenth Circuit eventually affirmed the decision of the District Court. The lynchpin of the Panel's decision was a finding that Dr. Ripley has no protected property interest, and thus no right to due process, because even if the Appellees had taken into account his degree, they could still choose to deny his admittance to the Medical Staff based upon his character and competence. The Panel found that because Wyo. Stat. Ann. §35-2-113 does not mandate a

result, it does not provide a protected property interest. The Tenth Circuit found the governing Supreme Court precedence to be the *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005).

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's finding that Dr. Ripley possessed no protectable property interest because "the procedure mandated by the statute does not require a particular outcome" is in conflict with clearly established Supreme Court precedence and misinterprets the Supreme Court's opinion in *Gonzales*. It has long been recognized by this Court that the fact that a property right may be extinguished by an adverse finding following a hearing does not negate the fact that the right is sufficient to merit due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Indeed, it is hard to envision a scenario in the employment area in which a due process hearing would dictate a mandated result.

Property interests are not created by the constitution itself. "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source" and "that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. The Wyoming Supreme Court has specifically found that the right to practice a licensed profession is a property right protected by the Due Process Clause of the United States Constitution, albeit a conditional

one. *In the Matter of Licensure of Jerry Penny, v. State of Wyoming Ex. Rel., Wyoming Mental Health Professions Licensing Board*, 120 P. 3d 152, 175 (Wyo. 2005); Paravecchio *v. Memorial Hospital of Laramie County*, 742 P.2d 1276, 1283 (Wyo. 1987). This includes the right of health care professionals not to be excluded from publically funded hospitals "by rules, regulations, or acts of the hospital's governing authorities which are unreasonable, arbitrary, capricious or discriminatory." *Garrison v. Board of Trustees of Memorial Hosp. of Laramie County*, 795 P.2d 190, 193 (Wyo. 1990). The Tenth Circuit has not seriously questioned in the past the fact that the right to medical privileges in Wyoming is a property interest protected by due process despite the fact that hospitals have the right to terminate those privileges for cause through a hearing. *Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384, 1395-1396 (10th Cir. 1988); *Stears v. Sheridan County Memorial Hospital Board of Trustees*, 491 F.3d 1160, 1163 (10th Cir. 2007).

A practitioner with a degree from a dental school has an additional right provided by Wyoming statute guaranteeing him that his degree is sufficient to allow him to be a member of the staff of any publically funded hospital with the same privileges as medical doctors, osteopaths, chiropractors, and podiatrists. The Tenth Circuit Panel is incorrect in its finding that conditional or qualified interests, such as Dr. Ripley's right to be member of WMC's Medical Staff, are not protected by the Due Process Clause. While it is true that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion", *Town of Castle Rock v. Gonzales*, Id. at 756, under Wyoming law, Wyoming Medical Center does not have discretion

to deny Dr. Ripley privileges because of his degree. It only has discretion to deny him those privileges on the basis of character and competence, something which it has never done.

While this Court is the ultimate determiner of whether a constitutionally protected property right exists, it has never excluded conditional property interests from protection under the due process Clause. Prior to the deprivation of a protected employment interest, it is necessary to provide the claimant with both a pre and post deprivation hearing which may or may not turn out favorably to the person seeking to enforce the property right. *Cleveland Board of Education v. Loudermill*, *id* at 541. The federal courts, including the Tenth Circuit, have regularly recognized this right, and *Gonzales* has not changed the law in that respect. *Teigen v. Renfrow*, 511 F.3d 1072, 1079 (10th Cir. 2007). The Supreme Court has similarly recognized that Due Process rights in other areas of the law are enforceable through the requirement of a hearing despite the fact that at the end of that hearing that right may be extinguished. *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d. 90 (1971).

The Tenth Circuit's reliance on *Gonzales* to deny Dr. Ripley a property interest in Medical Staff privileges expands *Gonzales* well beyond the parameters of the opinion. The Supreme Court in *Gonzales* did not intend to extinguish the long recognized right to a due process hearing before a public entity may deprive a person of a conditional property interest. The opinion in *Gonzales* instead addressed the narrower question of whether law enforcement agencies may be sued under the Due

Process Clause for failing to intervene to prevent third parties from depriving a person of a property interest. The Court's analysis relied heavily on the "well established tradition of police discretion" and the "deep-rooted nature" of discretion in law enforcement decisions. *Town of Castle Rock v. Gonzales*, *Id.* at 760-761. In *Gonzales*, the Supreme Court specifically found that "the serving of the public rather than private ends is the normal course of criminal law". *Town of Castle Rock v. Gonzales*, *Id.* at 765.

The Supreme Court's analysis in Gonzalez is summarized succinctly by its ultimate finding that "the benefit that a third party may receive from having someone else arrested for a crime does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations." *Town of Castle Rock v. Gonzales*, *Id.* at 768. With the exception of this case, the circuit court opinions which have applied the *Gonzales* rationale have involved similar attempts to limit governmental responsibility for the indirect loss of a property interest caused by a third parties. *Sandage v. Board of Commissioners of Vanderburgh County*, 548 F.3d 595 (7th Cir. 2008, *Burella v. City of Philadelphia*, 501 F.3d 134 (3rd Cir. 2007), *Hudson v. Hudson*, 475 F.3d 741 (6th Cir. 2007), *Howard ex rel. Estate of Howard v. Bayes*, 457 F.3d 568 (6th Cir. 2006), *Schroder v. City of Fort Thomas*, 412 F.3d 724 (6th Cir. 2005). At the same time other circuit courts continue to uphold the existence and enforceability of conditional property interest claims. *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2008), *Crum v. Vincent*, 493 F.3d 988 (8th Cir. 2007).

This Court in *Gonzales* did not purport to overturn the treatment of conditional property rights

set forth in *Loudermill*, but the Tenth Circuit's opinion does. The Tenth Circuit's use of *Gonzales* as the foundation for the decision in this case is contrary to clearly established Supreme Court precedent.

The Panel in its decision cites *Teigen* in support of its finding that Dr. Ripley does not have a protected property interest in Medical Staff privileges. Suffice it to say that the right to a promotion, transfer or other benefits sought to be enforced through due process in *Teigen* was expressly negated by Colorado statute and case law. The opposite is true in this case.

This case is also dissimilar to the case of *Crown Point I, LLC v. Intermountain Rural Electric Association*, 319 F.3d 1211 (10th Cir. 2003) cited by the Panel for the proposition that a claimant who is entitled to only procedure does not have a protected property right. In that case, plaintiff attempted to utilize the federal court to prevent the construction of a transmission line. Plaintiff alleged that it had an entitlement to and was denied the utilization of a hearing through special review procedures contained in the Code of the Town of Parker. The Tenth Circuit, relying on established land use precedent found no due process violation because the Town of Parker had unlimited discretion to deny the application regardless of the procedures utilized.

A state creates an interest protected under the Due Process Clause "by placing substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983). In this case Wyoming Medical Center did not have unlimited discretion to deny Dr. Ripley's application to

be a member of the Medical Staff. *Wyo. Stat. Ann. §35-2-113* limits the hospital's discretion. Dr. Ripley was entitled to not only procedure. Under the facts of this case, he was entitled to have his property interest in Medical Staff membership enforced.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant this Petition for Writ of Certiorari to the United State Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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(any footnote(s) trail end of each document)

No. 08-8015

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES F. RIPLEY, D.D.S., M.H.A.,
Plaintiff-Appellant,
v.
WYOMING MEDICAL CENTER, INC., a Wyoming corporation; JAMES ANDERSON, M.D.; JOHN D. BAILEY, M.D.; STEVE CHADDERDON; THOMAS CUNNINGHAM, M.D.; MARK DOWELL, M.D.; KEN EICKOFF; PAM FULKS; BILL McDOWELL; MARK McGINLEY, M.D.; SUSIE McMURRY; STEVEN ORCUTT, M.D.; DIANE PAYNE; MIKE REID; CRAIG SMITH; LOUIS STEPLOCK, M.D.; WERNER STUDER, M.D.; JAY A. SWEDBERG, M.D., individually, Defendants-Appellees.

March 16, 2009, Filed

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING. (D.C. No. 06-CV-091-J).

COUNSEL: Stephen H. Kline, Kline Law Office, P.C., Cheyenne, Wyoming, for Plaintiff-Appellant.

Scott E. Ortiz, (Stuart R. Day, P. Craig Silva and Ryan J. Schwartz on the brief), Williams, Porter, Day & Neville, P.C., Casper Wyoming, for Defendants-Appellees.

Before BRISCOE, EBEL, and HARTZ, Circuit Judges.

OPINION

BRISCOE, Circuit Judge.

Plaintiff-Appellant James F. Ripley ("Dr. Ripley") appeals the district court's order granting summary judgment in favor of Defendants-Appellees on his 42 U.S.C. § 1983 due process claim. Defendants-Appellees are former or current administrators or board members of Wyoming Medical Center, along with Wyoming Medical Center itself, and are hereinafter collectively referred to as "Wyoming Medical Center." Wyoming Medical Center's denial of Dr. Ripley's membership to the medical staff was the genesis of Dr. Ripley's claim.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

Dr. Ripley is a dentist, with additional training in anesthesiology and as an oral and maxillofacial surgeon. He does not hold an M.D. or D.O. degree, and is licensed through the Wyoming Board of Dentistry. Dr. Ripley moved to Wyoming and began practicing with two other oral surgeons. Prior to moving to Wyoming, Dr. Ripley practiced the specialty of oral and maxillofacial surgery and received admitting privileges in many areas of the United States.

Wyoming Medical Center's medical staff bylaws have qualification requirements for membership, which state that only "physicians" may be members of the medical staff. A "physician" is defined as a person holding an M.D. or D.O. degree. Wyoming Medical Center's bylaws also state that only members of the medical

staff may have admitting privileges. As a result, allied health professionals[2] are not permitted by the bylaws to independently admit patients or perform histories and physicals,[3] although they can receive clinical privileges at the hospital. The bylaws also provide that, unlike a member of the medical staff, an allied health professional's clinical privileges may be terminated at any point by the chief of staff, the executive committee, or the administration of the hospital without a hearing. Allied health professionals cannot be a member of committees of the medical staff or participate in quality of care or peer review issues.

Wyoming Medical Center allowed Dr. Ripley to apply for clinical privileges as an allied health professional. On his application for privileges, Dr. Ripley wrote in longhand that he was applying for "admission H&P [history and physical]" privileges. Aplt. App. at 412-13, 415. Dr. Ripley was granted surgical privileges by Wyoming Medical Center, and his application was approved "as requested." *Id.* at 334. It is disputed whether Dr. Ripley was given full admitting and history and physical privileges with his grant of clinical privileges. For several months after Dr. Ripley was granted surgical privileges, however, he admitted his own patients and performed his own histories and physicals.

About a year after Dr. Ripley was granted privileges, Dr. MacGuire, the chief of surgery at Wyoming Medical Center, wrote to Dr. Ripley and informed him that he did not have admitting privileges because he was not a member of the medical staff. A subsequent meeting of the trauma committee involved a discussion of Dr. Ripley's privileges, and a vote that only general

surgeons and family practitioners should be allowed to admit trauma patients. Dr. Ripley believed Dr. MacGuire had wrongfully canceled his privileges, and he began to seek changes to the bylaws to allow him membership and privileges equivalent to those of physicians. Shortly thereafter, Dr. Ripley was informed that the medical staff was not interested in pursuing changes to the bylaws.

Dr. Ripley spent periods of the next year and a half lobbying for changes to the bylaws. Different committees within Wyoming Medical Center considered Dr. Ripley's proposed bylaws changes, but ultimately recommended no change, based on the belief that it would be better for patient care to have physician oversight for oral surgeons. Wyoming Medical Center informed Dr. Ripley that if he needed to admit a patient and have someone sign off on a history and physical, Wyoming Medical Center had twenty-four hour physician coverage for that purpose. Through this process, a medical doctor would be present to address any medical problems associated with Dr. Ripley's patients, which may extend beyond jaw or maxillofacial problems. Dr. Ripley ultimately brought the present action, asserting in part that Wyoming Statute § 35-2-113 gave him a property right in membership to the medical staff of the Wyoming Medical Center and that the Wyoming Medical Center had deprived him of that property right without due process.

II

Standard of Review

We review the district court's summary judgment decision *de novo*, applying the same legal standard used by the district court. *ClearOne Commc'ns, Inc. v. Nat'l Union Fire Ins. Co.*, 494 F.3d 1238, 1243 (10th Cir. 2007). Under this standard, summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is 'genuine' if the evidence allows a reasonable jury to resolve the issue either way and is 'material' when it is essential to the proper disposition of the claim." *Haynes v. Level 3 Commc'ns*, 456 F.3d 1215, 1219 (10th Cir. 2006) (internal quotation omitted). On an appeal from a motion for summary judgment, we construe all factual inferences in favor of the party against whom summary judgment was entered. *NISH, Inc. v. Rumsfeld*, 348 F.3d 1263, 1266 (10th Cir. 2003). In addition, we review the district court's interpretation and determination of state law *de novo*. *Freightquote.com, Inc. v. Hartford Cas. Ins. Co.*, 397 F.3d 888, 892 (10th Cir. 2005).

Property Interest in Medical Staff Membership

Title 42 U.S.C. § 1983 creates a private right of action against any person who, under color of state law, deprives another individual of "any rights, privileges or immunities secured by the Constitution and laws."[4] "To set forth an actionable procedural due process claim, a plaintiff must demonstrate: (1) the deprivation of a liberty or property interest and (2) that no due process of law was afforded." *Stears v. Sheridan County Mem'l Hosp. Bd. of Trs.*, 491 F.3d 1160, 1162 (10th Cir. 2007) (citing *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253

(10th Cir. 1998)). "'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Id.* at 1163 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). "Courts must look to existing rules or understandings that stem from an independent source such as state law to define the dimensions of protected property interests." Id. (quoting *Setliff v. Mem'l Hosp. of Sheridan County*, 850 F.2d 1384, 1395 (10th Cir. 1988)).

Dr. Ripley contends that Wyoming Statute § 35-2-113 gives him a property interest in membership to the medical staff of Wyoming Medical Center. Section 35-2-113 states, in its entirety:

> Any hospital owned by the state, or any hospital district, county or city thereof, and any hospital whose support, either in whole or in part, is derived from public funds, shall be open for practice to doctors of medicine, doctors of osteopathy, doctors of chiropractic, doctors of dentistry and podiatrists, who are licensed to practice medicine or surgery, chiropractic, dentistry or podiatry in this state.
>
> Provided, however, that these hospitals by appropriate bylaws shall promulgate reasonable and uniform rules and regulations covering staff admissions and staff privileges.
>
> Admission shall not be predicated solely upon the type of degree of the applicant and the

> governing body shall consider the competency and character of each applicant.

Wyo. Stat. Ann. § 35-2-113.

There is no question that Wyoming Medical Center is a hospital whose support is derived from public funds, and that section 35-2-113 is broadly applicable.[5] The parties' dispute centers on the statute's further interpretation. Dr. Ripley contends that as a "doctor of dentistry," section 35-2-113 requires that Wyoming Medical Center be "open for practice" without "solely" relying on his "type of degree," and that Wyoming Medical Center must instead "consider the competency and character of each applicant." Dr. Ripley then argues that two cases "clearly establish" that he has a property interest in membership to the medical staff of Wyoming Medical Center, citing *Paravecchio v. Mem'l Hosp. of Laramie County*, 742 P.2d 1276 (Wyo. 1987), overruled in part on other grounds by *Torres v. Wyoming*, 2004 WY 92, 95 P.3d 794, 796 (Wyo. 2004), and *Garrison v. Bd. of Trs. of Mem'l Hosp. of Laramie County, Wyo.*, 795 P.2d 190 (Wyo. 1990). Aplt. Br. at 13-14.

Dr. Ripley is correct that the Wyoming Supreme Court has addressed similar issues that bear upon the same subject matter addressed by section 35-2-113. The specific holdings of these cases, however, do not support Dr. Ripley's claim. In Paravecchio, the Wyoming Supreme Court held that, although the right to practice medicine was a property right, it was a conditional property right, and under rational basis review, the state had a legitimate interest in regulating the healthcare profession. 742 P.2d at 1282-83. Paravecchio did not specifically address section 35-2-

113. In Garrison, the Wyoming Supreme Court again generally stated:

> We have held that one of the primary purposes of a hospital's medical staff committee is to ensure the dispensation of quality medical care. Moreover, the right to practice medicine, while it is a property right, is conditional and subject to the police power of the state. We have recognized that it is improper for any court to substitute its judgment for that of the board of trustees concerning management and operation of a hospital. A hospital board of trustees has the power to make reasonable rules and regulations defining the conditions under which physicians might avail themselves of the facilities of the hospital. A physician does not have an unqualified right, constitutional or otherwise, to practice his profession in a public hospital; but a physician may not be excluded by rules, regulations or acts of the hospital's governing authorities which are unreasonable, arbitrary, capricious, or discriminatory.
>
> In reviewing a decision of a public hospital to refuse to grant or to terminate staff privileges of a physician, whether the review is conducted in the district court or in this court, the applicable standard of review is one which accords great deference to a hospital's decision. That review is limited to a determination of whether the exclusion was made on a rational basis, supported by substantial evidence, in accordance with reasonable hospital bylaws, and was not discriminatory, arbitrary, or capricious. We

> accord deference to the decisions of hospital trustees because in making such decisions they are placed between the "rock" of answering to actions, such as [the plaintiff physician's], and the "hard place" of ensuring, as best they can, the avoidance of actions for negligence in selection and appointment of staff.

795 P.2d at 193 (internal citations omitted) (emphasis added). In *Garrison*, the court concluded that the defendant hospital had not abused its discretion in denying hospital privileges to the plaintiff physician based on the physician's false answer to an application question. The court did not address section 35-2-113 in its analysis. *Id.* at 193-94.

Neither *Paravecchio* nor *Garrison* is specifically on point, as neither addresses section 35-2-113 directly, or a procedural due process claim based on section 35-2-113. However, a case from this circuit, *Stears v. Sheridan County Mem'l Hosp. Bd. of Trs.*, 491 F.3d 1160, 1162 (10th Cir. 2007), briefly addresses section 35-2-113 along with a procedural due process claim brought in a context similar to the case before us. In *Stears*, the plaintiff radiologist filed a procedural due process claim against a hospital based on the hospital's entry into an exclusive contract with another radiologic services provider, thereby excluding from the hospital's radiology department any radiologist who was not associated with the contract provider. 491 F.3d at 1161. In addition to his procedural due process claim, the plaintiff filed a claim under section 35-2-113 and a breach of contract claim based on the alleged violation of the hospital's bylaws. *Id.* The plaintiff alleged that, although he remained a member of the medical staff at

the hospital, the hospital's exclusive use of its contract provider deprived plaintiff of his procedural due process rights. *Id.* at 1162.

Regarding the procedural due process claim, we affirmed the district court's determination that if the plaintiff's hospital privileges were the property interest asserted, then "although he may be entitled to this interest, he has not been deprived of it." *Id.* at 1163 (citing approvingly the district court's analysis). We also affirmed the district court's determination that if the plaintiff's asserted property interest was *the exercise* of his hospital privileges, then the procedural due process claim failed because there was no "legitimate claim of entitlement" to *the exercise* of hospital privileges, when hospital privileges remain intact. *Id.* The plaintiff based his property interest on the hospital's bylaws' requirement that if "clinical privileges" were "reduced, suspended, or revoked," then the physician must be afforded notice and a hearing if the hospital's action was "deemed adverse." *Id.* We reasoned that the plaintiff could still vote, hold office, and serve on medical staff committees as a member of the medical staff, and that his inability to exercise his clinical skills at the hospital was not a reflection on his professional competency, indicating that the hospital's actions were not adverse. *Id.* Regarding section 35-2-113, we noted that the plaintiff's due process claim under the statute failed because the "statute is simply an antidiscrimination statute" and, because the plaintiff's staff privileges were not revoked, section 35-2-113 was not applicable. *Id.* at 1164.

After review of these cases, we conclude that section 35-2-113 does not provide Dr. Ripley with the property

interest he claims, which is membership to the medical staff of Wyoming Medical Center. In fact, the opposite is true. The Wyoming cases state, and Dr. Ripley agrees, that the right to practice medicine at a particular hospital is a conditional property right. *Paravecchio*, 742 P.2d at 1282-83; *Garrison*, 795 P.2d at 193. *Garrison* also states that "great deference" should be given to a hospital's decision regarding staff privileges. 795 P.2d at 193. In our decision in *Stears*, we concluded section 35-2-113 is not violated when the plaintiff physician still had privileges to practice at the hospital (*i.e.*, "his staff privileges ha[d] not been revoked"), even though the defendant hospital's exclusive contract with other providers reduced the practical value of his privileges. *Stears*, 491 F.3d at 1164.

Further, reading section 35-2-113 independently of these cases, we conclude that the most the state statute gives Dr. Ripley is a state-law interest in consideration for admission to the medical staff of Wyoming Medical Center. Section 35-2-113's first sentence requires that a state-funded hospital "shall be open for practice" to licensed clinical providers. Wyo. Stat. Ann. § 35-2-113. The statute's second sentence permits "reasonable and uniform rules and regulations covering staff admissions and staff privileges." *Id.* The statute's final sentence states that "[a]dmission shall not be predicated solely upon the type of degree of the applicant. . . ." *Id.*

Therefore, at most, section 35-2-113 creates a state-law interest in consideration for admission to the medical staffs of Wyoming public hospitals, with consideration predicated upon an applicant's competency and character, rather than solely upon the type of degree

held by the applicant. However, under governing Supreme Court and Tenth Circuit precedent, because this is a procedural right without a mandated outcome, this state-law interest is not protected under the Due Process Clause.

In *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005), the Supreme Court held that "an entitlement to nothing but procedure" cannot serve as the basis for a property right protected by the Due Process Clause:

> The Due Process Clause extends procedural protection to guard against unfair deprivation by state officials of substantive state-law property rights or entitlements; the federal process protects the property created by state law. But Gonzales claims a property interest in a statem-andated process in and of itself. This argument is at odds with the rule that "process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." . . . Just as a State cannot diminish a property right, once conferred, by attaching less than generous procedure to its deprivation, neither does a State create a property right merely by ordaining beneficial procedure unconnected to some articulable substantive guarantee.

Id. at 771 (Souter, J., concurring) (internal citations omitted; emphasis added).

In the wake of *Gonzales*, this Court considered whether employees of the Colorado Department of Corrections

had a protected property interest in "the right to be considered for promotion and transfer according to the standards set forth in the Colorado Constitution and state statutes." *Teigen v. Renfrow*, 511 F.3d 1072, 1080 (10th Cir. 2007). The *Teigen* plaintiffs relied on "state constitutional requirements that 'appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness,'" as well as on statutory provisions providing that "'any person has an equal opportunity to apply and compete for state employment'" and that "'appointments and promotions to positions shall be based on job-related knowledge, skills, abilities, competencies, behaviors, and quality of performance as demonstrated by fair and open competitive examinations.'" *Id.* (internal citations omitted).

We held that "none of these provisions of state law create[d] a cognizable property interest for purposes of constitutional due process," precisely because the statutes created entitlements to "nothing but procedure." *Id.* at 1080, 1081. We explained that "[t]he subtle distinction between the right to be selected for promotion and the right to take part in the promotion process is insufficient to salvage Plaintiffs' due process claims." *Id.* at 1081. Most critically, we went on to hold that "[e]ven assuming state law grants every state employee the right to be fairly considered for promotion, this right is not itself a substantive right, but rather a vehicle for arriving at the ultimate promotion decision." *Id.* (emphasis added).

In *Crown Point I, LLC v. Intermountain Rural Electric Association*, 319 F.3d 1211, 1216 (10th Cir. 2003), a pre-*Gonzales* decision, this Court explained

how we may determine whether an entitlement to procedure also comprises a substantive entitlement protected by due process:

> A property interest exists if discretion is limited by the procedures in question, that is, whether the procedures, if followed, require a particular outcome. However, where the governing body retains discretion and the outcome of the proceeding is not determined by the particular procedure at issue, no property interest is implicated.

Id. at 1217 (emphasis added). Under Wyo. Stat. Ann. § 35-2-113, there is no guarantee that Dr. Ripley will be admitted to the medical staff after consideration on the basis of his character and competence; the procedure mandated by the statute does not require a particular outcome. Therefore, any state-law interest he has in that consideration does not constitute a property interest protected by the Due Process Clause.

We need not reach the question of whether due process was afforded to Dr. Ripley, because we have found no deprivation of a property interest. *See Stears*, 491 F.3d at 1162 (stating that a procedural due process claim first requires deprivation of a property interest). The district court properly applied the summary judgment standards in its order.

III

We AFFIRM the district court's grant of summary judgment in favor of Wyoming Medical Center.

Footnotes

1Dr. Ripley's complaint also alleged violations of sections 6 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. The district court granted summary judgment to Wyoming Medical Center on these antitrust claims in a separate order and Dr. Ripley does not appeal that order.

2An allied health professional is an individual who has received specialized training in some area of the medical field. Taber's Cyclopedic Medical Dictionary 66 (16th ed. 1989).

3A "history and physical" is the starting point for an inpatient's stay in a hospital. It is the written document that details the patient's chief complaint and other pertinent history, as well as the physical examination of the patient, both of which are precursors to admission. See Taber's Cyclopedic Medical Dictionary, *supra* note 2, at 835 (defining "history"); *id.* at 1397(defining "physical examination").

4To bring a successful action under § 1983, a plaintiff must show state action. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447-48 (10th Cir. 1995). The district court found that Wyoming Medical Center was a state actor and Dr. Ripley urges us in his opening brief to affirm this portion of the district court's order. Aplt. Br. at 17-21. Wyoming Medical Center does not address the state action issue and we likewise do not address it, as it is unnecessary to our resolution of Dr. Ripley's appeal.

5Wyoming Medical Center is a corporate organization operating under an operating lease agreement with the local county. The local county owns the physical facilities used by the hospital, and the hospital receives funds from the county. In exchange, Wyoming Medical Center, through the operating lease agreement, agrees to provide indigent care to the county.

Case No. 06-CV-091J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

JAMES F. RIPLEY, D.D.S., M.H.A.,
Plaintiff,

vs.

WYOMING MEDICAL CENTER, INC., a Wyoming Corporation and JAMES ANDERSON, M.D., JOHN D. BAILEY, M.D., STEVE CHADDERDON, THOMAS CUNNINGHAM, M.D., MARK DOWELL, M.D., KEN EICKOFF, PAM FULKS, BILL MCDOWELL, MARK MCGINLEY, M.D., SUSIE MCMURRY, STEVEN ORCUTT, M.D., DIANE PAYNE, MIKE REID, ED RENEMANS, CRAIG SMITH, M.D., LOUIS STEPLOCK, M.D., WERNER STUDER, M.D., JAY SWEDBERG, M.D., AND ROBERT TRIPENY, as individuals,
Defendants

January 30, 2008, Decided
February 1, 2008, Filed

COUNSEL: For DDS, MHA James F Ripley, Plaintiff: Stephen H Kline, LEAD ATTORNEY, KLINE LAW OFFICE, Cheyenne, WY.

For Wyoming Medical Center Inc, a Wyoming Corporation, Defendant: Scott E Ortiz, LEAD ATTORNEY, Stuart R Day, WILLIAMS PORTER DAY & NEVILLE, Casper, WY.

For MD James Anderson, individually, MD John D Bailey, individually, Steve Chadderdon, individually, MD Thomas Cunningham, individually, MD Mark Dowell, individually, Ken Eickoff, individually, Pam Fulks, individually, Bill McDowell, individually, MD Mark McGinley, individually, Susie McMurry, individually, MD Steven Orcutt, individually, Diane Payne, individually, Mike Reid, individually, MD Craig Smith, individually, MD Louis Steplock, individually, MD Werner Studer, individually, MD Jay A Swedberg, individually, Defendants: Scott E Ortiz, LEAD ATTORNEY, WILLIAMS PORTER DAY & NEVILLE, Casper, WY.

Alan B. Johnson, UNITED STATES DISTRICT JUDGE.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiff's Motion for Partial Summary Judgment, the defendants' response in opposition thereto, the plaintiff's further reply and all of the parties' supplemental submissions have come before the Court for consideration. The Court, having reviewed the parties' written submissions, materials filed in support of their respective positions, the pleadings of record, the applicable law, and being fully advised, FINDS and ORDERS that the plaintiff's motion for partial summary judgment should be DENIED and that the defendants are entitled to summary judgment on plaintiff's Section 1983 claim, for the reasons stated below.

Background

This Court has entered a separate order granting summary judgment in favor of defendants on the plaintiff's three anti-trust claims. An extensive discussion of the pertinent background of this dispute is set out in that Order and is incorporated by reference herein as if set forth in full. The facts as outlined in that Order will not be restated herein; any additional facts that relate to the instant motion will be included as necessary.

Earlier in this litigation, this Court entered an Order permitting the plaintiff to amend his complaint to assert a Section 1983 claim against the defendants. The Wyoming Supreme Court has discussed *Wyoming Medical Center* specifically:

> "WMC is a non-profit corporation organized by the county to operate Memorial Hospital of Natrona County in Casper, Wyoming. WMC is run by a board of directors (Board) appointed by the medical staff, the community, and county commissioners. The Board is overseen by the Board of Trustees of Memorial Hospital of Natrona County (Trustees), a board appointed by the Board of County Commissioners of Natrona County. WMC leases the land, buildings and equipment of the hospital from the Trustees in accordance with an operating lease."

Roussalis v. Wyoming Medical Center, Inc., 4 P.3d 209, 217 (Wyo. 2000).

Plaintiff attached the Operating Lease to his motion as Exhibit 2. Defendant also submitted the Affidavit of Richard L. Williams which also discusses the status of

WMC, a private, nonprofit corporation. All of these materials are consistent with the excerpt set forth above from the *Roussalis* case.

In his motion, plaintiff asserts that the defendants have violated his rights to substantive and procedural due process in violation of 42 U.S.C. § 1983. He argues that Section 1983 creates a private right of action against any person who under color of state law deprives another individual of any rights secured by the Constitution or laws of the United States or any State. He asserts that his property interests are protected by the Constitution and cannot be extinguished without due process of law.

Plaintiff contends that under existing statutory law in Wyoming, he has an expectation that he can be a full member of the WMC hospital staff and admit patients utilizing the same privileges as any other physician pursuant to Wyo. Stat. § 35-2-113. He argues that the hospital's decision to deny him staff admitting privileges is based solely upon his degree as a dentist; that he has an expectation under Wyoming law that his staff privileges will not be denied on that basis alone, and that before his property interest can be extinguished, he is entitled to receive notice and opportunity to respond.

In his motion, plaintiff asserts that the sole issue as to whether the defendants' actions violate 42 U.S.C. § 1983 is whether or not defendants' denial of hospital privileges was pursuant to state action. Plaintiff argues that established law demonstrates that Wyoming Medical Center acts under color of state law. Because of this, plaintiff asserts that the defendants have deprived

him of a property interest in staff membership at Wyoming Medical Center, and the actions of those defendants were taken under color of state law. Therefore, plaintiff contends he is entitled to judgment on the issue of liability on his due process claim. [1]

The defendants oppose the plaintiff's motion. They argue that plaintiff must show he was deprived of a property interest without due process of law and that the individual(s) who deprived him of his property interest were acting under color of state law. Defendants disagree with plaintiff Ripley's assertions and contend he does not have a property interest in staff membership, that WMC did not act under color of state law under these circumstances, and that he was not denied due process. They seek to have the plaintiff's motion for summary judgment denied.

Summary Judgment Standards

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. Fed. R. Civ. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 123 L. Ed. 2d 317 (1993). Thus, a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nelson v. Geringer*, 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most favorable to the party opposing summary judgment. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). The movant bears the initial burden of demonstrating the absence of evidence to support the non-moving party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When the non-moving party bears burden of proof at trial, the burden then shifts to it to demonstrate the existence of an essential element of its case. Id. To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

Discussion

The Court finds that the defendants are entitled to summary judgment in their favor and that plaintiff has failed to establish a cognizable claim pursuant to 42 U.S.C. § 1983.

Initially, the Court must determine whether the defendants acted under color of state law. In *Moore v. Wyoming Medical Center*, 825 F. Supp. 1531, 1540-1541 (D.Wyo. 1993), a case brought by a patient against the hospital and paramedics seeking to recover damages in connection with her detention as a mentally ill person

pursuant to Wyoming's Emergency Detention Statute, Judge Brimmer wrote:

> 2. Whether defendant *Wyoming Medical Center* acted under color of state law.
>
> Under the "public function" test for state action, a court may examine "the structure of the entity and its relationship to a governmental unit" to determine whether a private entity is a state actor under 42 U.S.C. § 1983. *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1196 (10th Cir. 1988) (citing *Burton v, Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)). See also, *Yeager v. City of McGregor*, 980 F.2d 337, 342-43 (5th Cir. 1993) (government-funded hospital not a state actor under § 1983); *Carnes v. Parker*, 922 F.2d 1506, 1509 (10th Cir. 1991) (government-funded hospital was a state actor under § 1983); *Albright v. Longview Police Dep't*, 884 F.2d 835, 840-41 (5th Cir. 1989) (government-funded hospital not a state actor); *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1221-22 (5th Cir. 1987), mod. on other grounds and reh'g en banc denied, 819 F.2d 545 (5th Cir. 1987), cert. denied sub nom., *Harris Methodist H-E-B Board of Trustees v. Jatoi*, 484 U.S. 1010, 108 S.Ct. 709, 98 L.Ed.2d 660 (1988) (government-funded hospital was state actor).
>
> A careful reading of both the Fifth and Tenth Circuit case law regarding the "public function" test leads this Court to consider the following three factors in deciding whether Wyoming Medical Center is a state actor:

> (1) whether the County receives a "direct financial benefit" from the private lessee, Wyoming Medical Center;
>
> (2) whether the County "benefitted" from the actual complained of violation(s);
>
> (3) whether the County retained "control [of] and responsibility" for the hospital;

Albright, 884 F.2d at 839-41; *Milo*, 861 F.2d at 1196-97.

In the instant case, "it cannot be disputed that some kind of relationship exists between [Natrona County, Wyoming] and [*Wyoming Medical Center*]. " 861 F.2d at 1196. Natrona County owns the physical facilities used by the medical center. Wyoming Medical Center receives funds from county mill levies and from sales tax revenue. The Board of Commissioners of Natrona County, Wyoming, in conjunction with the medical center's Board of Trustees, issued revenue bonds in 1990 in the principal amount of $ 16.5 million. *Wyoming Medical Center* services this debt from "net pledged revenues." The county mill levies, the sales tax revenues, and the bond indebtedness, together, comprised the majority of Wyoming Medical Center's net assets in 1989 and 1990.

Furthermore, section 4.2 of the operating lease between Natrona County and the medical center states that:

> [A]s long as the amount of indigent care furnished by [Wyoming Medical Center] together with premiums paid by [Wyoming Medical Center] for property insurance ... do not exceed, on an annual basis, five percent (5%) of the gross hospital operating revenues of [Wyoming Medical Center], ... then the payment of insurance premiums and the providing of indigent care by [Wyoming Medical Center] shall fulfill the rental obligation hereunder.

Section 5.1 of the lease provides that the property is exempt from county taxes. Section 9.1 of the lease provides that Natrona County may terminate the lease if Wyoming Medical Center fails to "discharge its public service mission and that the public interest is no longer being served by the continuation of this lease."

The Court finds that the relationship between Natrona County and Wyoming Medical Center amounts to state action for three reasons. First, Natrona County benefits from Wyoming Medical Center because the two entities are "financially interdependent." 884 F.2d at 840. The lease states that Wyoming Medical Center will provide indigent care to the county. The medical center's bond indebtedness, in which the county is a principal lender, must be serviced by the medical center's revenues. The medical center receives substantial benefits from the county in the form of reduced taxes and rent.

Second, Natrona County "benefitted" from the complained of activities because Wyoming Medical Center has a duty to service indigent patients according to the terms of its lease with Natrona County. Plaintiff Moore, who is indigent, complains that the defendants unlawfully detained her. This detention occurred as a result of services performed by Wyoming Medical Center's paramedics and emergency medical technicians. Moreover, non-indigent patients pay for these services so that indigent patients may receive care and treatment. The medical center uses revenues derived from these medical activities to service its bond indebtedness and to keep the hospital running, both of which directly benefit the county. Thus, Natrona County benefits from the services rendered by the defendants pursuant to the lease agreement. Compare *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-25, 81 S.Ct. 856, 860-62, 6 L.Ed.2d 45 (1961) (governmental entity economically benefitted from private entity's discriminatory policies).

Third, the County retains responsibility for the hospital. The lease provides that Natrona County ultimately determines whether the medical center properly discharges its public mission, although the County does not appear to control Wyoming Medical Center's day-to-day activities. The Tenth Circuit has held that a county may not insulate itself from liability by delegating its responsibility to operate a public hospital to a private entity. *Carnes*, 922 F.2d at 1509; *Milo*, 861 F.2d at 1197. Thus, Natrona

County remains responsible for Wyoming Medical Center's actions even though Natrona County may not directly control the medical center's day-to-day operations.

This Court rejects the defendants' argument that the Fifth Circuit's reasoning regarding "responsibility and control" in Albright should trump the Tenth Circuit reasoning in Carnes and Milo. In Albright, the Fifth Circuit distinguished its earlier decision in Jatoi. The Albright court reasoned that, in Jatoi, the especially created governmental entity, whose purpose it was to oversee the hospital's operations, caused the county to be "informed of decisions, including the decision to terminate Dr. Jatoi's privileges." 884 F.2d at 840. The Albright court found dispositive that, in Jatoi, the especially-created governmental entity retained "the ability to prevent or control the complained of conduct." Id. at 841. (citation omitted) (emphasis added).

However, unlike the Fifth Circuit, the Tenth Circuit does not find the "responsibility and control" factor dispositive of the state action issue. Instead, the Tenth Circuit takes a more expansive view of the "responsibility and control" factor, appearing to emphasize the "responsibility" aspect more than the "control" aspect. The Carnes and Milo decisions implicitly left room for the possibility that a private hospital may become a state actor pursuant to section 1983 even though the county was not "informed of [the private party's] decisions" as in Jatoi. See specifically, *Yeager*, 980 F.2d at 342,

> 342 n. 9; compare *Carnes*, 922 F.2d at 1509; *Milo*, 861 F.2d at 1197.

Id. at 1540-1542.

More recently, the Tenth Circuit discussed Section 1983 in *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995). That case analyzed the tests used most frequently to determine whether an actor's conduct has occurred under color of state law. The underlying principles of all of the pertinent analytical tests are designed to "'preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power'" and "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'" *Id.* at 1447. Further:

> The Court has taken a flexible approach to the state action doctrine, applying a variety of tests to the facts of each case. In some instances, the Court has considered "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351, 95 S.Ct. at 453. The Court has also inquired whether the state has "so far insinuated itself into a position of interdependence" with the private party, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S.Ct. 856, 861-62, 6 L.Ed.2d 45 (1961), that there is a "symbiotic relationship" between them, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175, 92 S.Ct. 1965, 1972-73, 32 L.Ed.2d 627 (1972). In addition, the Court has held that if a private party is "'a willful participant in joint

> activity with the State or its agents,'" then state action is present. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)). Finally, the Court has ruled that a private entity that exercises "powers traditionally exclusively reserved to the State" is engaged in state action. *Jackson*, 419 U.S. at 352, 95 S.Ct. at 454. See generally 1 Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees, §§ 5.10 to 5.15 (2d ed. 1991) (explaining various tests for state action).
>
> Under each of these four tests, "the conduct allegedly causing the deprivation of a federal right" must be "fairly attributable to the State." *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2753-54. In order to establish state action, a plaintiff must demonstrate that the alleged deprivation of constitutional rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." Id. In addition, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. In order to resolve the state action question before us, we will apply these general principles and each of the tests articulated by the Supreme Court.

Gallagher v. Neil Young Freedom Concert, 49 F.3d at 1447-1448 (emphasis supplied). See also *Bradley v. Health Midwest, Inc.*, 203 F. Supp.2d 1254 (D.Kan.

2002); *Carnes v. Parker*, 922 F.2d 1506 (10th Cir. 1991); *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988).

This Court believes the analyses set out above are appropriate in the instant case and dictate the conclusion that Wyoming Medical Center is a state actor in this case. There has been no meaningful argument with citation to authority that would indicate this Court should find WMC is not, for purposes of this Section 1983 action, a state actor or that its conduct would not constitute state action. [2] To the extent that the defendants seek summary judgment in their favor for this reason, the motion should be denied. However, that finding does not, contrary to the plaintiff's contentions, dictate a corollary conclusion that plaintiff is entitled to summary judgment in his favor for that reason.

For reasons to be discussed, the Court finds that the defendants are entitled to summary judgment in their favor for the reason that the plaintiff has not been deprived of a property interest in this case. This issue requires the Court to consider the parties' arguments with respect to Wyo. Stat. § 35-2-113. This statute provides:

> § 35-2-113. Doctors of medicine, osteopathy, chiropractic, dentistry or podiatrists may practice in public hospitals.
>
> Any hospital owned by the state, or any hospital district, county or city thereof, and any hospital whose support, either in whole or in part, is derived from public funds, shall be open for

> practice to doctors of medicine, doctors of osteopathy, doctors of chiropractic, doctors of dentistry and podiatrists, who are licensed to practice medicine or surgery, chiropractic, dentistry or podiatry in this state. Provided, however, that these hospitals by appropriate bylaws shall promulgate reasonable and uniform rules and regulations covering staff admissions and staff privileges. Admission shall not be predicated solely upon the type of degree of the applicant and the governing body shall consider the competency and character of each applicant.

Plaintiff contends that under this law, he has an expectation that he can be a full member of the WMC hospital staff and that he can admit patients utilizing the same privileges as any other physician. He contends that the statute prevents any hospital receiving public funds from discriminating against staff admissions and staff privileges based solely upon the type of the degree of the applicant and that it requires the governing body of the hospital to consider the competency and character of each applicant regardless of degree. The defendants contend that the statute is simply a non-discrimination statute.

The Court finds that the defendants' argument is the more persuasive argument and that the plaintiff's argument simply reaches too far and sweeps too broad a swath. The Tenth Circuit and the United States District Court for the District of Wyoming, has addressed this statute specifically. The Tenth Circuit considered similar issues in *Stears v. Sheridan County Memorial Hospital Board of Trustees*, 491 F.3d 1160, 1162 (10th Cir. 2007). The circuit court stated:

> To set forth an actionable procedural due process claim, a plaintiff must demonstrate: (1) the deprivation of a liberty or property interest and (2) that no due process of law was afforded. *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998).

Further:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Property interests are not derived from the Constitution. Id. Rather, "Courts must look to 'existing rules or understandings that stem from an independent source such as state law' to define the dimensions of protected property interests." *Setliff v. Mem'l Hosp. of Sheridan County*, 850 F.2d 1384, 1395 (10th Cir. 1988) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)).

Id. at 1162. The circuit court continued by discussing hospital privileges:

> The Hospital's bylaws define "clinical privileges" as "the permission granted to a practitioner to render specific diagnostic, therapeutic, medical, dental, or surgical services." Privileges "shall be extended only to professionally competent and ethical practitioners who continuously meet the

qualifications, standards, requirements, and responsibilities set forth in [the bylaws]." When a physician's privileges are "reduced, suspended, or revoked," if such action is "deemed adverse," the physician must be afforded notice and a hearing.

Dr. Stears argues that because the privileges he now possesses have no practical value, his privileges have been reduced, thus triggering the notice and hearing requirement. Yet, Dr. Stears acknowledges that, as a member of the active medical staff, he has the rights to vote, to hold office, and to serve on medical staff committees. The Hospital's decision to obtain a new exclusive provider in no way signifies a negative assessment of Dr. Stears's professional competence. Indeed, if he joined Bighorn Radiology, he could treat patients, as his privileges remain intact. The distinction between having medical staff privileges and being able to exercise those privileges is not a "fiction," as Dr. Stears claims, and we join a number of other courts in recognizing this distinction. See, e.g., *Engelstad v. Virginia Mun. Hosp.*, 718 F.2d 262, 267-69 (8th Cir. 1983); *Garibaldi v. Applebaum*, 194 Ill.2d 438, 448-449, 252 Ill.Dec. 29, 742 N.E.2d 279 (Ill. 2000); *Dutta v. St. Francis Reg. Med. Ctr., Inc.*, 254 Kan. 690, 867 P.2d 1057, 1062-63 (1994); *Bartley v. Eastern Maine Med. Ctr.*, 617 A.2d 1020, 1022-23 (Me. 1992); *Holt v. Good Samaritan Hosp. and Health Ctr.*, 69 Ohio App.3d 439, 590 N.E.2d 1318, 1323 (1990).

B. Breach of Contract

Dr. Stears next argues that the district court erroneously held that the Hospital did not violate the terms of the bylaws by entering into an exclusive contract with Bighorn Radiology without providing him a hearing. Using the same reasoning discussed above, the court found that Dr. Stears's privileges were not "reduced, revoked, or suspended" within the meaning of the bylaws. Further, the court distinguished between an action taken against the physician that arises incidentally out of a hospital's business decision to use exclusive contracts and corrective action taken directly against a physician. The court concluded that "nothing in the bylaws prevents a reasonable managerial decision by the Hospital Board to enter into an exclusive contract." We also find that the procedural requirements set forth in the bylaws are not implicated in this situation.

As stated above, the Hospital has not suggested that Dr. Stears is in any way incompetent or failed to perform under his contract. Therefore, at a hearing, Dr. Stears would not be defending his professional competence or ethics, but would be contesting the Hospital's decision to enter into an exclusive contract with another radiology services provider. As the court in Engelstad found, the procedural requirements of the bylaws "were not intended to cover cases ... where the use a doctor can make of his staff privileges has been incidentally affected by the hospital's administrative decision to terminate a personal service contract with the hospital. [A doctor's] staff privileges guarantee [ ] him only

> the authority, not the wherewithal, to practice his profession." 718 F.2d at 268. Any other finding "would be the death knell of exclusive contracts." *Holt*, 590 N.E.2d at 1321.

Id. at 1162-1164. With respect to Wyo. Stat. Ann. § 35-2-113, the opinion continues by providing:

> C. Wyo. Stat. Ann. § 35-2-113
>
> Finally, Dr. Stears claims that the Hospital violated Wyo. Stat. Ann. § 35-2-113 when it entered into an exclusive contract with Bighorn Radiology. This argument is without merit. Wyoming Statute § 35-2-113 states:
>
> > Any hospital owned by the state, or any hospital district, county or city thereof, and any hospital whose support, either in whole or in part, is derived from public funds, shall be open for practice to doctors of medicine, doctors of osteopathy, doctors of chiropractic, doctors of dentistry and podiatrists, who are licensed to practice medicine or surgery, chiropractic, dentistry or podiatry in this state. Provided, however, that these hospitals by appropriate bylaws shall promulgate reasonable and uniform rules and regulations covering staff admissions and staff privileges. Admission shall not be predicated solely upon the type of degree of the applicant and the governing body shall consider the competency and character of each applicant.

> We agree with the district court that this statute is simply an anti-discrimination statute. Dr. Stears argues that even if this interpretation is correct, the statute creates an expectation of enjoyment of staff privileges, subject only to reasonable and uniform regulations. However, as explained above, Dr. Stears's staff privileges have not been revoked. The Hospital's regulations conform to the requirements of Wyo. Stat. Ann. § 35-2-113.

Id. at 1164.

The district court in the Stears case discussed these arguments at length and similarly determined that Wyo. Stat. § 35-2-113 was an anti-discrimination statute:

> The first sentence refers to the categories of providers to which public hospitals shall be open. The third sentence, which must be read in conjunction with the first, prohibits exclusion of providers based on the category in which they fall, [footnote omitted] Similar statutes have been enacted in many states and referred to as antidiscrimination laws. . . .
>
> Plaintiffs read too much into the language "shall be open to practice," which the Court finds was not intended to grant an absolute right to use hospital facilities. The hospital retains the right, as recognized in § 35-2-113, to limit the use of hospital facilities by reasonable bylaws and rules. Neither does "a physician have an unqualified right, constitutional or otherwise, to

practice his profession in a public hospital. ..." *Garrison v. Board of Trustees of Memorial Hospital of Laramie County, Wyoming*, 795 P.2d 190, 193 (Wyo. 1990). In the instant case, the Memorial Hospital of Sheridan County Constitution acknowledges the Hospital Board's understanding of its right to limit access to its facilities. The Hospital's constitution allows the Hospital Board to limit the number of physicians on the staff in accordance with the needs of the Hospital. . . . Furthermore, the Hospital Board has been invested by the Wyoming legislature with broad power to manage the hospital and its staff. . . . See also *Collins v. Memorial Hospital*, 521 P.2d 1339, 1340 (Wyo. 1990) ("[T]he power of the trustees of a county hospital board are general and quite broad with the power to manage, operate, and control the hospital and its operations, § 18-318, W.S. 1957, along with the power to sue and be sued."). The Wyoming Supreme Court has held that "it is improper for any court to substitute its judgment for that of the board of trustees concerning management and operation of a hospital." *Garrison*, 795 P.2d at 193. If the Court were to accept the Plaintiff's interpretation of § 35-2-113, the Hospital Board would be stripped of a management tool it has come to rely on to attract radiologists and provide reliable, efficient, and cost-effective radiology services to the Sheridan community. Given the benefits to the public of exclusive contracts, the Court cannot find that the Wyoming legislature intended sub silentio to prohibit such contracts, [footnote omitted]

The Court holds that Wyoming Statute § 35-2-113 does not provide an unqualified right of access to a Hospital by a physician who enjoys privileges. Nor does § 35-2-113 prohibit the use of an exclusive contract that has the effect of denying access to the Hospital to some providers. The court finds that § 35-2-113 is an anti-discrimination statute and that the Hospital Board did not run afoul of the statute simply by exercising its power under Wyoming Statute to manage the Hospital by entering into an exclusive contract with one provider to the detriment of others. Defendants did not violate § 35-2-113.

42 U.S.C. § 1983

Plaintiffs claim that their right to due process was violated when the Hospital Board entered into an exclusive contract which effectively denied them the right to practice at the Hospital. The Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV. Section 1983 further provides, "Every person who, under color of statute . . . subjects . . . any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured 42 U.S.C. § 1983 (2004).

In order to prevail on a procedural due process claim, a plaintiff must demonstrate: (1) the

> deprivation of a liberty or property interest and (2) that no due process of law was afforded. *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998); *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). It is clear in this case, that Dr. Stears and Dr. Lindsey were not given due process. There was no hearing, even after the plaintiffs requested one on July 9, 2004. The real issue is whether Plaintiffs were "deprived of a property interest" when the Hospital Board entered into an exclusive contract with Dr. Alzheimer. The United States Supreme Court has held that to implicate a property interest "a person clearly must have more than an abstract need or desire for [a benefit]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. Property interests do not spring from the Constitution itself. Id. "Courts must look to 'existing rules or understandings that stem from an independent source such as state law' to define the dimensions of protected property interests." *Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384, 1395 (10th Cir. 1988) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)).

Stears v. Sheridan County Memorial Hospital Board of Trustees, Case No. 04-CV-223-D, Order on Cross Motions for Summary Judgment, Document 33 at 17-21 (footnotes omitted).

As in *Stears*, this case is not one which compels the Court to conclude that it should determine that Dr. Ripley's hospital privileges, as have actually been granted to him by WMC, are in conflict with the provisions of Wyo. Stat. § 35-2-113. He does not have an unqualified right to practice his specialty at WMC on the terms he chooses or believes are most appropriate; that is a matter with the power of the hospital board and inherently a part of its responsibilities to manage, operate and control the hospital and direct its operations, as defined by the applicable bylaws and regulations.

The real problem with plaintiff's arguments in the instant case lies in the facts upon which plaintiff has based his Section 1983 claim. The undisputed fact is that plaintiff Ripely has not been denied an opportunity to obtain or exercise his hospital privileges at all in this case. He, without dispute, continues to have granted privileges to practice within the scope of his specialty at WMC. His own refusal to perform elective procedures for his patients at WMC does not give rise to any cognizable Section 1983 claim. The statute does not require the hospital to open its facilities up to any practitioner on the terms requested by the practitioner as plaintiff seems to suggest. The law simply requires that the hospital not discriminate between practitioners on the basis of degree. At all times, the hospital retains the ability to determine the terms and conditions that govern the granting and exercise of privileges in that facility. As noted in the above excerpts and in the hospital's bylaws, portions which are included in Appendix A attached to this court's prior Order Granting Defendants' Motion for Summary Judgment, membership on the hospital's medical staff is not a

right. Dr. Ripley has the present ability to practice his specialty of oral and maxillofacial surgery at WMC.

This is quite unlike the situation confronting the Court in *Stears* where the hospital's decision to enter into an exclusive with another provider of radiological services had immediate and dramatic impact of those plaintiff radiologists. The hospital's exclusive contract with other radiologists did not deprive the plaintiffs in Stears of their hospital privileges and they remained members of the hospital staff. The grant of privileges does not and did not constitute a contract of employment or a protected right in the circumstances of that case.

Because plaintiff Ripley has not been denied privileges to practice his specialty at WMC, even though the privileges he holds may be conditioned or qualified, he has not been deprived of a property interest. The Court finds there is no due process violation in this case and plaintiff Ripley does not have a protected property interest that would support a valid Section 1983 claim against the defendants. Thus, the Court finds that the defendants are entitled to summary judgment in their favor as a matter of law on the plaintiff's Section 1983.

Accordingly, it is therefore

ORDERED that plaintiff's Motion for Partial Summary Judgment shall be, and is, DENIED. It is further

ORDERED that summary judgment shall be, and is, entered in favor of defendants on plaintiff's Section 1983 claim.

Judgment shall be entered accordingly.

Dated this 30th day of January 2008.

/s/ Alan B. Johnson

UNITED STATES DISTRICT JUDGE

Footnotes

1 For convenience, all of the defendants are referred to collectively in this Order as "defendants" unless otherwise specified. Defendants Anderson, Bailey, Chadderdon, Cunningham, Eickoff, Mcdowell, McMurry, Payne, Reid, Studer, and Tripeny were at relevant times members of the Board of Directors of WMC, with control over the activities of WMC. Defendants Dowell, McGinley, Orcutt, Payne, Smith, Steplock, Studer and Swedberg in February 2006 are alleged to be members of the Medical Staff Development Committee making recommendations to the Board of Directors of WMC regarding privileges and who should be permitted to be a member of WMC's Medical Staff. Fulks and Renemans were at relevant times President and Senior Vice-President of WMC, responsible for oversight and coordination of day to day activities and sitting as non-voting members of the Board of Directors and as members of the Medical Staff Development Committee, also making recommendations to the Board regarding privileges and who should be permitted to be a member of WMC's Medical Staff.

2 To the extent that plaintiff argues the individual defendants have engaged in conduct that arguably

might support a Section 1983 claim, the Court finds that his allegations are insufficient to do so. Other than the allegations involving their activities as members of committees, medical staff members or board members for WMC, there is no conduct by these private individuals alleged to have violated the plaintiff's rights.

4/28/2009

No. 08-8015

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES F. RIPLEY, D.D.S., M.H.A.,
Plaintiff-Appellant,
v.
WYOMING MEDICAL CENTER, INC., a Wyoming corporation; JAMES ANDERSON, M.D.; JOHN D. BAILEY, M.D.; STEVE CHADDERDON; THOMAS CUNNINGHAM, M.D.; MARK DOWELL, M.D.; KEN EICKOFF; PAM FULKS; BILL McDOWELL; MARK McGINLEY, M.D.; SUSIE McMURRY; STEVEN ORCUTT, M.D.; DIANE PAYNE; MIKE REID; CRAIG SMITH; LOUIS STEPLOCK, M.D.; WERNER STUDER, M.D.; JAY A. SWEDBERG, M.D., individually, Defendants-Appellees.

ORDER

Before BRISCOE, EBEL, and HARTZ, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Amendment V

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.